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D. Agazarian

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-190157

DATE: February 10, 1978

MATTER OF: Alfred C. Odiorne - Claim for Retroactive
Promotion and Backpay

DIGEST: Wage grade employee of Department of Navy was reclassified from position of Supervisory Production Shop Planner WN-4 to WN-7 as result of classification appeal, and he claims backpay for period of wrongful classification. Employee has no entitlement to backpay under pertinent civil service regulations implementing 5 U.S.C. 5346 (Supp. II, 1972) which authorizes job grading system for prevailing rate employees. Also, Supreme Court held in United States v. Testan, 424 U.S. 392 (1976) that there is no entitlement to backpay for period of erroneous classification under 5 U.S.C. 5101-5115 involving General Schedule employees. Wage board classification statute is similar to that for General Schedule statute since it also does not expressly provide for backpay.

Mr. Alfred C. Odiorne has appealed the action of our Claims Division in Certificate of Settlement dated July 20, 1977, which denied his claim for a retroactive promotion and backpay for the period July 8, 1973, to February 2, 1975.

The record shows that on July 8, 1973, Mr. Odiorne, an employee of the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, was reassigned from the position of Planner and Estimator (Pipefitter), WD-8 to Supervisory Production Shop Planner (General) WN-4. Mr. Odiorne's new position was that of Head of the Planning Staff of the Service Shop Group at the Portsmouth facility.

On November 26, 1974, Mr. Odiorne appealed his position classification to the Office of Civilian Manpower Management, Department of the Navy, Washington, D.C. Mr. Odiorne contended that his position was comparable to that of Supervisory Production Shop Planner positions in other components of the Portsmouth base which were graded at the WN-7 level, and he requested a corresponding upgrading of his position. On January 8, 1975, Mr. Odiorne's appeal was granted on the basis that his position met the criteria of the Civil Service Commission's key level definition #023 for job

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classification standards for Supervisory Production Shop Planners which indicated that WN-7 was the proper grade level for Mr. Odiorne's position. The decision granting the appeal provided that Mr. Odiorne's reclassification was to be effective as of the first pay period beginning after January 25, 1975. Mr. Odiorne's position reclassification was effective on February 2, 1975.

Mr. Odiorne claims backpay on the basis that when he initially questioned his classification in September 1973 his supervisor told him that the classification was correct. Mr. Odiorne also states that the Department of the Navy did not advise him until November 1974 of his rights to appeal his position classification. We are not aware of any authority which would provide Mr. Odiorne with a right to backpay on the basis of either his supervisor's incorrect advice or the agency's failure to promptly inform him of his appeal rights.

Mr. Odiorne also argues that his claim for backpay should be allowed on the basis of our decision Harold A. Bruce, B-183125, November 14, 1975, in which we held that the Department of Agriculture's promotion of a GS-7 employee to GS-8 instead of GS-9 was an administrative error which constituted an unjustified or unwarranted personnel action under 5 U.S.C. 5596 (1970) which entitled the employee to backpay. However, Bruce, supra, is not relevant to the present case since in Bruce the higher graded position already existed in the claimant's office and the agency violated its own written criteria for promotion by not promoting the employee to the GS-9 level. We, therefore, allowed Mr. Bruce a retroactive promotion and accompanying backpay on the basis that the agency had not carried out a nondiscretionary agency policy. Also, see 54 Comp. Gen. 403 and Matter of Pompeo et al., B-186916, April 25, 1977. In Mr. Odiorne's case we are not aware of any agency policy or regulation which would have required the Portsmouth Naval Shipyard to promote him to the WN-7 level. Accordingly, our decision in Bruce, supra, is not applicable to Mr. Odiorne's claim.

The job grading or classification of prevailing rate positions is governed by the provisions of 5 U.S.C. 5346 (Supp. II, 1972) which empowers the Civil Service Commission to prescribe regulations regarding the classification of positions.


Section 532.702(b)(11) of title 5, Code of Federal Regulations (1976) provides that except where a classification action results

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in a downgrading or other reduction in pay, the effective date of a change of classification may not be earlier than the date of the decision nor later than the beginning of the first pay period which begins after the 60th day from the date the application was filed. The sole provision for a retroactive effective date for classification is when there is a timely appeal which results in the reversal, in whole or part, of a downgrading or other classification action which had resulted in the reduction of pay. See 5 C.F.R. 532.702(b)(9). Accordingly, the reclassification of a position may not be made retroactively other than as provided for in 5 C.F.R. 532.702(b)(9).

In United States v. Testan, et al., 424 U.S. 392 (1976) the United States Supreme Court held that there is no substantive right to backpay for periods of wrongful position classification where the pertinent classification statutes (5 U.S.C. 5101-5115) did not expressly make the United States liable for pay lost through an improper classification. We note that the classification statute applicable in this instance, 5 U.S.C. 5346 (Supp. II, 1972), also does not contain any express provision making the United States liable for pay lost during a period of improper classification. In addition, the court held in Testan, supra, that the Back Pay Act, 5 U.S.C. 5596 (1970) did not afford a remedy for periods of erroneous classification.

In view of the Supreme Court's holding in Testan and since Mr. Odiorne does not qualify for retroactive promotion and backpay under the above-discussed civil service regulations, there is no authority which would allow the claim for backpay for the period during which he occupied a position classified as WN-4. Accordingly, the backpay for the period claimed may not be allowed and the action of our Claims Division is sustained.


Deputy Comptroller General
of the United States

D. Aagazarian
CP

UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

TO : Director, Claims Division

February 10, 1978

FROM : Deputy
Comptroller General *P. H. K. 11/11/77*

SUBJECT: Alfred C. Odiorne - Request for Retroactive Promotion
and Backpay - B-190157-O.M.

Returned herewith is file 2-2630186 forwarded here on
September 16, 1977, in connection with Mr. Odiorne's appeal
from your disallowance of his claim for backpay for a period
of erroneous classification. Your action is sustained by
our decision of today B-190157, copy attached.

Attachments